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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1014

THE BROTHERHOOD OF RAILROAD TRAINMEN, ET AL.,
Petitioners,

v.

UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Petitioners Brotherhood of Railroad Trainmen, et al.,[1] pray that a writ of certiorari issue to review the

[1] Petitioners are all of the labor organization defendants herein except the Brotherhood of Locomotive Engineers (BLE), which was separately represented in the courts below, and which we understand is filing a separate petition. These petitioners, with

judgment of the United States Court of Appeals for the Fifth Circuit entered on August 31, 1971, rehearing denied November 18, 1971.

OPINIONS BELOW

The opinion of the Court of Appeals (App. 127a-216a), is not yet officially reported, but is unofficially reported at 3 EPD ¶ 8324 (1971). The opinion of the District Court, consisting of findings of fact, conclusions of law, judgment and order (App. 1a-126a), is reported at 316 F. Supp. 567 (1970).

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the abbreviated designations used by the courts below and herein, are as follows:

Brotherhood of Railroad Trainmen (BRT), now merged into United Transportation Union (UTU);

Railroad Yardmasters of America (RYA);

Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employes (BRAC);

Transportation-Communications Employees Union (TCU), now affiliated with BRAC;

Brotherhood of Maintenance of Way Employes (BMWE);

American Railway Supervisors Association (ARSA);

Brotherhood of Railroad Signalmen (BRS);

System Federation No. 50 of the Railway Employes' Department, AFL-CIO (System Federation No. 50);

International Association of Machinists and Aerospace Workers (IAMAW);

International Brotherhood of Electrical Workers (IBEW);

Brotherhood Railway Carmen of America (BRCA);

Brotherhood of Locomotive Firemen and Enginemen (BLF&E) now merged with UTU;

International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers (Boilermakers);

Sheet Metal Workers' International Association (SMW); and

International Brotherhood of Firemen, Oilers, Helpers, Roundhouse and Railway Shop Laborers (IBFO).

JURISDICTION

The judgment of the Court of Appeals was entered on August 31, 1971 (App. 217a). Petition for rehearing and rehearing *en banc* were denied on November 18, 1971 (App. 218a-219a), and the mandate of the Court of Appeals was stayed until February 8, 1971, pending application to this Court for a writ of certiorari, by order of December 10, 1971 (App. 220a). The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254 (1).

QUESTIONS PRESENTED

1. Does the current existence of a racial imbalance among employees, presumed to have resulted from discrimination throughout "five decades of employment history", constitute a violation of the Civil Rights Act of 1964 where there has been no showing of discrimination subsequent to the Act's effective date or for a reasonable time prior thereto; and is the Act violated by a failure to correct such racial imbalance because of declining employment and the presence of white incumbent employees in jobs desired by black employees?

2. Does the fact that a railroad terminal's craft and class seniority system, standard throughout the industry and admittedly non-discriminatory in itself, constitutes an obstacle to the correction of a pre-Act racial imbalance through its protection of white job incumbents against displacement or layoff, destroy its status as a bona fide seniority system within the meaning and intent of Section 703(h) of the Civil Rights Act of 1964, and make the maintenance of the system a violation of the Act?

3. Does the judgment of the Court of Appeals, requiring that the effects of presumed discrimination prior to the effective date of the Civil Rights Act of 1964 be remedied by according to black employees preferential seniority rights withheld from white employees, violate the constitutional rights of employees who would be adversely affected, and contravene the clear intent of Congress and the provisions of the Act?

4. May a reviewing court properly reverse a judgment for defendants and order entry of a judgment for plaintiffs on the basis that the trial court proceeded on a wrong theory of relevancy of evidence, when such outright reversal effectively forecloses defendants from defending the case and offering evidence on the theory espoused by the reviewing court.

5. Is the existence of separate local unions a *per se* violation of the Civil Rights Act of 1964, when they exist on a voluntary basis, with no racial bar to membership and no limiting or adverse effect on employment opportunities; and is the Act violated by a union's failure to recruit or force membership upon a minority employee to whom membership is available upon application?

Underlying most of the questions stated above is the additional one of whether the Court of Appeals erred in reversing findings by the District Court based upon substantial evidence as to employment practices both prior and subsequent to the Civil Rights Act of 1964, and substituting contrary appellate findings of pre-Act discrimination founded upon statistics, inferences and presumptions based thereon, and the Court's own interpretation and construction of contracts and documents differing from that of testimony heard by the

trial court with respect to their intent and practical application. While not arguing this question at any length as an independent reason in support of this petition, we wish to preserve the right to urge it as a ground for reversal if the writ of certiorari is granted.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The statutory provisions principally involved are the following portions of Sections 703(c), 703(h), 703(j) and 706(g) of the Civil Rights Act of 1964 (42 U.S.C., Sec. 2000e-2(c), 2(h), 2(j), and Sec. 2000e-5(g)):

"Sec. 703. . .

. . .

"(c) It shall be an unlawful employment practice for a labor organization—

"(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;

"(2) to limit, segregate, or classify its membership, or to classify or fail to refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or

"(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section."

. . .

"(h) Notwithstanding any other provision of this title, it shall not be an unlawful employment

practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, . . . provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, . . ."

. . .

"(j) Nothing contained in this title shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this title to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section or other area, or in the available work force in any community, State, section, or other area."

"Section 706 . . .

. . .

"(g) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include reinstatement or hiring of employees, with or with-

out back pay . . . . No order of the court shall require the admission or reinstatement of an individual as a member of a union or the hiring, reinstatement, or promotion of an individual as an employee; or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex or national origin or in violation of Section 704(a)."

The action of the Court of Appeals also raises questions involving rights of due process under the Fifth Amendment to the Constitution of the United States, the pertinent portion of which states:

"Amendment V

". . . nor shall any person . . . be deprived of . . . property, without due process of law; . . ."

STATEMENT OF THE CASE.

This is a "pattern or practice" suit brought by the Attorney General of the United States under Section 707 of Title VII of the Civil Rights Act of 1964 (42 U.S.C., Sec. 2000e-6), which became effective July 2, 1965, against the Jacksonville Terminal Company and (including parties defendant added prior to trial) 16 labor organizations, including these 15 petitioners. (See note 1, p. 1.) Section 707 provides in part as follows:

"Sec. 707. (a) Whenever the Attorney General has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights secured by this subchapter, and that the pattern or practice is of such a nature and is

> intended to deny the full exercise of the rights herein described, the Attorney General may bring a civil action in the appropriate district court of the United States . . . ."

Broadly speaking, the complaint charged the Company with racially discriminatory practices and the union defendants with being parties to collective bargaining agreements tending to perpetuate the effects of the Company's alleged practices; and in addition it was alleged that three of the union defendants "maintain" segregated locals in violation of the Act. The detailed contentions of the parties, as well as a brief description of the lengthy pre-trial and trial proceedings, is set forth in the statement of the case with which the District Court's opinion is prefaced. (App. 1a-11a, 316 F. Supp., pp. 569-573).

In the District Court, with few exceptions the Government made no effort to establish that the union defendants had themselves been guilty of unlawful racially discriminatory acts and practices, either by specific conduct, through the operation of the provisions of collective bargaining agreements to which they are parties,[2] or by collusion and acquiescence in the Company's alleged conduct. Rather, the main thrust of the Government's contentions was that the Company had engaged in discriminatory acts and practices with respect to hiring, job assignments and promotions, and that the collective bargaining agreements, and particularly the seniority provisions thereof, perpetuated or tended to perpetuate the effects of the

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[2] In its finding of fact V, A-11, the District Court said: "The Court further finds that Government counsel agreed in open court that the provisions of each of the current collective bargaining agreements were not racially discriminatory by their terms and in and of themselves." (App. 72a, 316 F.Supp., p. 600.)

Company's discrimination. Accordingly most of the evidence related to Company practices and policies in the area of hiring and promotions, an area in which the Company was substantially free from restriction, and possessed managerial discretion, under the collective bargaining agreements.[3]

The case presented by the Government placed primary emphasis on a showing of racial imbalance with respect to Negro employment in the skilled and more highly paid positions at the Company. But the evidence also showed that both at the company and in the railroad industry as a whole there had been a drastic shrinkage in total employment, and a minimal number of new hires and promotions, during the past few decades.

The District Court found on the basis of undisputed evidence, that:

> "4. As of August 6, 1969, the Company had approximately 532 employees, a decline from a 1953 work force of approximately 1,200 employees. Of these 532 employees some 275 were white and some 257 were Negro. Approximately 50 of the 532 employees did not work full time; rather, they filled vacancies or temporary assignments as needed. The foregoing figures do not reflect employees on leave of absence or furloughed employees who did not work actively. The Company's annual passenger train volume has decreased from 35,000 in 1944 to 10,000 in 1969; annual operating expenses have dropped from $4.9 million in 1960 to $2.3 million in 1969. Losses were $5.5 million in 1960 and $2.9 million in 1961.
>
> "The Company, as a result of declining volume of operations, and to a certain extent as a result

[3] See finding of fact V, A-12, App. 72a, 316 F. Supp., p. 600.

of mechanization, has substantially contracted its work force. As a corollary of the declining work force, job vacancies and promotional opportunities have in general been minimal while reductions in force have occurred regularly. This contraction in the Company's business and corresponding reduction in manpower is not unlike that experienced by the railroads nationwide." (Finding of fact II-4; App. 13a-14a, 316 F. Supp. pp. 574-575.)

In such a factual setting, long antedating the Civil Rights Act of 1964 and continuing through the trial of this case, it would have been impossible for the Company to substantially change any pre-existing racial imbalance in employment unless it arbitrarily furloughed or demoted current incumbents of the various positions, thus artificially creating openings for new hirings and promotions.

The provisions of the collective bargaining agreements attacked by the Government are either identical to or substantially in conformity with those in effect on other railroads throughout the country, both as to the written provisions and the manner in which they are interpreted and applied. (Findings and Concl. IV-3, 4; VI-9(c); App. 60a-61a, 112a; 316 F. Supp. pp. 595, 617.) The seniority system in effect at the Company under these agreements is similarly in conformity nationally. (Findings and Concl. IV-8, 9, 10, 11; App. 64a-66a; 316 F. Supp. 597-598.) The agreements and the craft and class seniority systems had their genesis in General Order No. 27 of the Director General of Railroads, United States Railroad Administration, issued May 25, 1918, during the period of federal control of the railroads in World War I, and various supplements to said order. (Findings and Concl. IV-1, 2, 7; App. 59a-64a; 316 F. Supp. pp. 594-597.)

Similarly undisputed were the facts that the system of representation and bargaining by separate crafts and classes of employees at the Company, as required by the Railway Labor Act, is standard throughout the industry; that there are no artificial or "dual" crafts or job classifications;[4] and that there is a true functional distinction between each department, subdepartment, craft, class and job classification at the Company. (Findings and Concl. III A-4, 6; VII 3, 6, 7; App. 21a-24a; 117a-118a; 316 F. Supp., pp. 578-579, 619-620.)

Pursuant to stipulation of the parties, the District Court found, with respect to the collective bargaining agreements, that "white and Negro employees similarly situated are subject to the same provisions regarding transfer, accumulation and retention of seniority", and that their application and effect was the same, at the Company and on railroads throughout the country, regardless of the racial consist or "mix" of the employees affected. (Findings and Concl. IV-4 (and footnote 42), 5, 6; V A-10; App. 61a-63a, 71a; 316 F. Supp., pp. 595-596, 600.)

At the trial the Government made no serious or effective attempt to prove actual instances of racial discrimination in hirings or promotions by the Company, but relied on inferences to be drawn from a statistical racial imbalance among the Company's employees. Thus, there was no showing, either before or after the Act, that individual Negro employees actually competed against white for specific jobs, and that they were denied such jobs though equally or better qualified.

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[4] Compare *Norman* v. *Missouri Pacific Railroad*, 414 F. (2d) 73 (C.A. 8, 1969).

The Company, on the other hand, established, both by cross-examination of witnesses called by the Government and by testimony adduced as part of its own case, that both before and after the Act it gave consideration to all employees without regard to race, and had followed a consistent policy of hiring or promoting the best qualified persons available for any vacancies that needed to be filled.

The District Court further found that the existence of separate local unions of 2 out of the 16 defendant labor organizations, on a voluntary basis with no bar to membership, and the failure of a third to recruit or force membership upon a Negro employee to whom membership had been available at least since 1960, did not violate the Act since the evidence showed that there had been no adverse effect upon anyone's employment opportunities, or any denial of membership.

The Court of Appeals affirmed the District Court's holding that the Company's post-Act hiring and initial job assignment practices and policies, based on its "best-qualified" standard, were not discriminatory, and were "subject to no historically discriminatory antecedents". (App. 176a-186a.) But it reversed the District Court's holding insofar as promotions and transfers were concerned, on the basis that the current statistical imbalance of white employees in higher paid jobs must have resulted from pre-Act discrimination, and that the rights of the incumbent white employees under the seniority systems interposed an obstacle to the promotion and transfer of Negroes to better jobs, and hence constituted a post-Act perpetuation of pre-Act discrimination. (App. 187a-203a.) Although the evidence failed to show specific instances of pre-Act discrimination, and testimony as to the application of various collective bargaining agreements showed that

for many years prior to the Act their provisions, said by the Government to be objectionable, had not been interpreted or applied in a discriminatory manner,[5] the Court of Appeals found that the District Court should have considered the current statistical racial imbalance in the light of "five decades of employment history", and that it had erred in unduly restricting the material time-frame of the evidence.

While conceding the fact that the craft and class seniority systems promoted safety and efficiency of operation, the Court of Appeals held that they were not bona fide seniority systems within the meaning of Section 703(h) of the Act, because they operated to restrict the transfer and promotion opportunities of incumbent black employees.

The Court of Appeals did not remand the case so that more evidence might be adduced with respect to the greatly extended time-frame which it said the District Court should have considered. Rather, on the basis that statistical evidence corroborated the hypothesis of pre-Act discrimination, that "it is obvious" that agreements have not always been interpreted in a non-discriminatory fashion, that "pre-Act racial discrimination appears obvious", and that there can be "no reasonable justification" or "any plausible nonracial explanation" for the current statistical racial imbalance (App. 189a-190a), it substituted its own appellate findings and prescribed "guidelines" which the District Court must follow in granting relief. The model decree thus formulated by the Court of Appeals (App. 209a-214a) would grant superseniority to all Negro employees hired prior to the entry of the final

[5] Under the Railway Labor Act collective bargaining agreements are not usually made effective for a specific period, and the actual written agreements often continue unchanged for many years.

District Court decree on remand, permitting them to compete for job retention, transfers, or promotions on the basis of company seniority dating from their initial employment, while limiting white employees to their contractual craft and class seniority dates.

The basis for federal jurisdiction in the court of first instance, the United States District Court for the Middle District of Florida, Jacksonville Division, as alleged in the complaint, was Section 707(a) and (b) of the Civil Rights Act of 1964 (42 U.S.C., Sec. 2000e-6(a) and (b)).

REASONS FOR GRANTING THE WRIT

The decision of the Court of Appeals in this case places in jeopardy the craft and class seniority systems prevailing throughout the railroad industry, and the vested rights and job security of hundreds of thousands of railroad employees. It does so by extending the scope of the Act's prohibitions far beyond the limitations of Congressional intent as shown by the legislative history and carefully drawn provisions of the statute, and by mandating a remedy for the supposed violations which itself contravenes the Act and the constitutional rights of those who would be adversely affected. The decision is in conflict with principles enunciated by this Court and at least one other Court of Appeals, as well as District Court decisions in other circuits, and is not supported by the decisions of other Courts of Appeals. And the court's method of disposition of the case by its model decree, and the scope and impact of the remedy provided therein, departs from the accepted and usual course of judicial procedure to a degree approaching denial of constitutional rights of due process.

1. The decision below is without support in the statute, contravenes the clear legislative intent, and denies constitutional rights of individual railroad employees affected.

The decision of the Court of Appeals in this case constitutes an unwarranted expansion of a judicially developed concept relating to perpetuation of the effects of pre-Act discrimination, in direct conflict with the intent of Congress. Here the court has in fact found a violation of a non-retroactive statute solely on the basis of a failure to remedy the effects of presumed pre-Act conduct, where those effects consist simply of a pre-Act racial imbalance, and the failure to remedy them is the result not of any post-Act discriminatory acts and practices, but of an industry-wide decline in employment and the presence of incumbent white employees in jobs sought by Negro employees.

That Congress did not intend other than prospective operation of Title VII of the Act, nor that it would support preferential treatment of minorities who had suffered pre-Act discrimination, is abundantly clear from the language and legislative history of the statute, and was recognized by the decision of the court below in *Local 189, United Papermakers & Paperworkers* v. *United States,* 416 F. (2d) 980, 987 (cert. den. 397 U.S. 919 (1970)), and footnote 8 to the opinion in that case. Section 703(j) of the Act expressly proscribes any requirement of preferential treatment to correct pre-existing racial imbalance in employment. And the court below acknowledged that ". . . the Terminal must continue to protect the jobs of incumbent whites. Assuming *arguendo* for the moment that past or present discriminatory conduct has occurred, white employees need not suffer displacement, layoff, or furlough merely to satisfy some court-imposed quota or black/white ratio." (App. 162a.)

The model decree embodied in the opinion below flies in the face of that acknowledgment. It prescribes preferential treatment in the form of superseniority for Negro employees—initial employment date to be used by Negroes, while whites are limited to craft and class seniority—enabling them to displace white incumbents and thereby remedy the current statistical racial imbalance.

Such preferential treatment is in direct conflict with the intent of Congress and the express provisions of Sec. 703(j) of the Act, stating that the Act is not to be interpreted as requiring "preferential treatment to any individual or to any group because of race . . . on account of an imbalance which may exist . . . ."

The superseniority given Negro employees by the decision below would also accord them preferential treatment by conferring on them seniority rights not enjoyed by employees in the railroad industry generally, nor by the Company's white employees, to transfer and be promoted from one craft or class to another, or within a craft or class, on the basis of date of initial employment, subject only to their meeting minimum job qualification standards. Under the standard railroad seniority systems in effect at the Company seniority in one craft confers no right to transfer to another craft, nor does advancement within a craft generally depend on seniority accumulated in a lower classification.[6] Thus the decision below gives Negroes superseniority, while leaving whites with *no* seniority, for purposes of transfer and promotion.

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[6] The court below recognized that "Ordinarily seniority acquired on one of the Terminal's thirty-five seniority rosters cannot be used for bidding on a job vacancy on another roster." (App. 138a).

Sec. 703(h) of the Act provides that "it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority system." Here the court below has held that the seniority systems here involved are not bona fide, but with no basis for such holding except that they present an obstacle to the correction of a pre-existing racial imbalance. A holding that such a perpetuation of consequences refutes the bona fide nature of a seniority system under Section 703(h) of the Act is a clear perversion of Congressional intent and would completely emasculate the statutory provision; and there is no other basis in the record on which the bona fide nature of the seniority systems at the Terminal may be challenged. Their non-discriminatory origin, nation-wide application regardless of the population's racial mix, and racial neutrality were not questioned by the Government, and the court below conceded that they promote the safe and efficient operation of the Terminal. (App. 193a-194a.)

The court below similarly ignored, and in effect wrote out of the statute, the obviously carefully worded provisions of Sec. 703(c) dealing with unfair employment practices of labor organizations. The findings of fact by the District Court (App. 101a-106a; 316 F. Supp., pp. 613-615) on the issues of segregated local unions and failure to recruit a Negro employee were not challenged by the Government below, which took the position that the separate locals here involved were a *per se* violation of the Act. On these as well as other issues the Court of Appeals made no attempt to justify its holding under the "clearly erroneous" principle of

Rule 52(a), so that its decision actually stands for the proposition that the Act is violated by the mere existence of separate locals on a voluntary basis, with no racial bar to membership and no effect on employment opportunities; and that it is violated by failure to recruit or force membership upon a minority employee to whom membership is available.

Finally, it is clear that the remedy prescribed by the court below, and detailed in the model decree, constitutes reverse racial discrimination in violation of the constitutional rights of employees who would be adversely affected. The "affected group" to be benefited by the decree is strictly racial, and the benefits would be conferred at the expense of the loss of jobs and valuable seniority rights by non-members of the group. While vested property rights in seniority and employment are not immune to change by proper contractual or statutory processes, their destruction on a purely racial basis cannot meet the requirements of due process of law under the Fifth Amendment to the Constitution.

2. The decision below is in conflict with decisions of this Court, the Court of Appeals for the Eighth Circuit, and District Courts in other Circuits.

In finding a violation of the Act on the basis of failure to correct a pre-existing racial imbalance, and requiring that such imbalance be remedied through preferential treatment in the form of superseniority on a racial basis, the decision below is in direct conflict with the principles stated by this Court in *Griggs* v. *Duke Power Co.*, 401 U.S. 424, —, 28 L.Ed. (2d) 158, 164, where it said:

> ". . . the Act does not command that any person be hired simply because he was formerly the

> subject of discrimination, or because he is a member of a minority group. Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed . . . ."

Similarly condemning absolute racial preference of the sort mandated by the court below, on grounds that it would violate both the Constitution and the Civil Rights Act of 1866 (42 U.S.C., Sec. 1981), is the decision of the Court of Appeals for the Eighth Circuit in *Carter* v. *Gallagher*, — F. (2d) —, 3 FEP Cases 900 (1971).[7]

And in other railroad cases where the Attorney General has made a similar attack upon the craft and class seniority systems, and has urged as authoritative the decision of the court below, the only two decided cases, *United States* v. *St. Louis-San Francisco Ry. Co.*, 3 EPD ¶ 8263 (E.D. Mo. 1971; pending on appeal to the Court of Appeals for the Eighth Circuit), and *United States* v. *Chesapeake & Ohio Ry. Co.*, 3 EPD ¶ 8331 (E.D. Va. 1971), stand in direct conflict with the decision below. And in the *Chesapeake & Ohio* case the court expressly held the seniority systems to be bona fide.

While no other case of which we are aware, involving the same attack upon railroad craft and class seniority systems, has gone to decision or supports the holding below, a great deal of such litigation, both Government and private, is currently pending, and

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[7] While granting a modified form of relief on rehearing the court (— F. (2d) —, 4 FEP Cases 121 (1972)), did not recede from its position with respect to the unconstitutionality of absolute racial preference; and the relief afforded related to hiring of new employees, not displacement or unequal treatment of incumbents.

in almost every instance the decision of the Court of Appeals has been urged as a basis for holding such seniority systems in violation of the Act. In view of the proliferation of these cases, an authoritative ruling by this Court is desperately needed by the railroad industry, to resolve doubts of both management and employees as to their rights, obligations and liabilities, particularly in the vital areas of job security and seniority rights.

3. In reversing the District Court and ordering disposition of the case in accordance with its model decree, the Court of Appeals departed from the accepted and usual course of judicial procedure to a degree approaching denial of due process.

In this case, as contrasted with many previous civil rights decisions, there was no stipulation or admission of either post-Act or pre-Act discrimination by the defendants. To support its allegations the Government relied almost exclusively on statistics showing a racial imbalance in employment at the Terminal, and "shunned the burden of augmenting its statistics" (App. 186a) when confronted by defendants' concrete evidence of non-discriminatory employment practices and valid reasons for its personnel actions.

In connection with its holding that the Government had thus failed to prove discriminatory post-Act hiring and assignment policies or practices, the Court of Appeals stated (App. 182a):

> ". . . Once Terminal officials proffered justifying explanations for their actions, the Government should have shown that stated policies and assignment realities did not coincide after July 2, 1965.
>
> "To make such a showing, the Government must have proved that whites received job assignments

> denied blacks, that the jobs were available when the blacks applied, and that the blacks' qualifications were equal or superior to the hired whites' . . . ."

In trying the case, the District Court proceeded on the theory, which the court below recognizes as in accord with the general rule in such cases (App. 165a-167a), of a relevant time-frame consisting of a few years prior to Title VII's effective date and all years thereafter up to the decision of the case. The defendants, understandably, made no attempt to extend their evidence of non-discriminatory practices back over "five decades of employment history", nor did the Government assume for that period the burden which it had shunned as to post-Act practices.

The Court of Appeals decision holds, however, that this time-frame was too constricted; and without specific evidence or findings as to policies, acts and practices extending over the longer period, but on the basis of allegations and the same statistical case which had failed to carry the day as to post-Act practices, concludes that there must have been discrimination in hiring and assignment policies 30 or 40 years ago, the "consequences" of which (continuing racial imbalance) persisted post-Act, supplying the springboard for the drastic remedy invoked.

A piercing question emerges—how could the defendants rebut allegations considered by the District Court to be irrelevant and too remote in time to be material to the issue presented? Should the defendants have undertaken an analysis of pre-Act hires and assignments to refute the Government's allegations and statistics with respect to practices and events in the

1930's and 1940's, in the face of the District Court's ruling as to the relevant time-frame?

We submit that the ruling of the Court of Appeals that the case was tried on the wrong theory may not properly form the basis for an outright reversal of the decision of the District Court and the mandating of judgment against the defendants, thus foreclosing any opportunity of defendants to have their day in court in a trial conducted on the theory now held to be proper.

Moreover, the model decree grants preferential superseniority to Negro employees not shown to have been discriminated against, including those hired during the post-Act period when the Court of Appeals held there had *not* been discrimination in hiring on initial job assignments, to the detriment of white employees not shown to have been the beneficiaries of any discrimination. Thus the decision below grants a remedy where there was no wrong.

4. The questions involved are of vital importance to the railroad industry, and the conduct of its labor relations and craft and class collective bargaining within the framework of special statutory regulation which Congress had made applicable to it, and have not been, but should be, settled by this Court.

In this "pattern or practice" action the opinion of the Court of Appeals goes far to erode the system of collective bargaining by separate autonomous craft organizations which has long prevailed in the railroad industry pursuant to Congressional mandate. The "employment seniority" created by the model decree, conferring multi-craft rights, is completely foreign to the industry, its unique requirements, and the needs and proper objectives of its employees. Its necessary

effect is to downgrade skill levels and job security in all crafts. It would usurp one of the prime functions of collective bargaining, the seniority system under which men work, and as pointed out by the dissenting Judge, would substitute the courts for specialized statutory administrative agencies in the field of railroad labor relations.

While the Court of Appeals disavows any applicability of its decision to the railroad industry as a whole (App. 203a), the contrary is obvious from the fact that the seniority systems here held in violation of the statute are uniform throughout the industry. On the theory of the decision below, any railroad having a statistical racial imbalance among its employees is immediately vulnerable to the same kind of judgment.

The craft and class system of railroad seniority is by far the oldest and most commonly known seniority system. The railroad industry was "the first industry in which the seniority system was formally developed to any considerable extent."[8] For years the public has automatically associated seniority with railroads, and it is uniformly recognized as one of the most valuable assets of railroad employment.

Railroad seniority has from the beginning been on the basis of crafts and classes of employees. Collective bargaining on that basis has long been recognized and mandated by Congress. (Railway Labor Act, Sec. 2 Fourth, 45 U.S.C., Sec. 152 Fourth.) The statutory obligation to bargain collectively on a craft or class basis, with the exclusion of all others, has been con-

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[8] Dan H. Mater, *The Development and Operation of the Railroad Seniority System*, Univ. of Chicago Journal of Business, Vol. XIII, No. 4, October 1940, and Vol. XIV, No. 1, January 1941.

sistently enforced since this Court's decision in *Virginian Ry. Co.* v. *System Federation,* 300 U.S. 515 (1937). The model decree of the Court of Appeals, with its cross-craft superseniority, is irreconcilable with the whole statutory scheme of representation and collective bargaining in the railroad industry.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

References in this Petition to the Appendix (App. —), are to the pages of the Appendix accompanying the Petition filed in No. 71-1010, *Jacksonville Terminal Company* v. *United States of America*.